United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 21770

VANCE V. ALLEN

Appellant

vs.

UNITED STATES OF AMERICA

Appellee

378

BRIEF FOR APPELLANT

STATEMENT OF QUESTIONS PRESENTED

1. The question is whether there is probable cause for a search without a warrant where there has been no arrest and the arresting officer has been told by a stranger to him only that the appellant has robbed the stranger, and alternatively,

2. The question is whether a police officer, having made an arrest upon a suspicion of robbery, without further probable cause, may then search the arrested individual to obtain evidence that justifies the probable cause for arrest.

I N D E X

TABLE OF CASES

* Cases or authorities chiefly relied upon are marked with an asterisk.

STATEMENT OF CASE

Appellant, Vance V. Allen, was charged with unauthorized use of a vehicle by Count I and with robbery of an automobile of the value of $3,100.00, a wallet of the value of $1.00, and a watch of the value of $25.00. He was tried before the Court without a jury on December 26 - 27, 1967, and convicted of unauthorized use of a vehicle under Count I and of robbery of one watch of the value of $25.00 under Count II.

At trial, the government called two witnesses: the arresting officer and the alleged robbery victim. The victim testified that about 10 p.m. on March 29, 1967, he was pushed from behind into his car by one person while the appellant jumped into the victim's car on the right-hand side (TR 15, 16, 17). The appellant and an unknown party proceeded to drive various places in the District of Columbia with the complainant in the back seat (TR 20, 21, 23, 24, 25) for approximately three hours (TR 49). During this period of time, the appellant had taken from the complainant a wrist watch (TR 36).

The car stopped in an alley where both the appellant and the unknown party left the car (TR 43). The complainant, upon seeing a police car approach, jumped out and "started hollering, 'Get him, get him. He done robbed me...'" (TR 44). The policeman asked the complainant what appellant had taken from him and the complainant replied, "My watch." (TR 45) The police officer then took the watch (Govt's Ex. 1) from the arm of appellant (TR 45, 46).

The arresting officer testified that he saw two persons drive a car into an alley about the 400 block of Richardson Street, N. W. (TR 78). After circling the block, the police drove up behind the car when the complainant jumped out of the car claiming the appellant had robbed him (TR 78, 79). After the arresting officer received a report of robbery, he arrested the appellant and searched him (TR 80) and found a watch which the complainant identified as his (TR 83). He further testified that he arrested the appellant upon a very strong suspicion of robbery (TR 88).

STATEMENT OF POINTS

1. It was error for the Court to find that even if the seizure of the watch preceded the full revelation of the facts to the officer, an arrest at the point of the shout of the complainant to "Get him, he robbed me," was a valid arrest.

2. It was error for the Court to fail to exclude the watch as the result of an unlawful search and seizure.

SUMMARY OF ARGUMENT

Probable cause did not exist in this fact situation for an arrest of appellant, and, alternatively, if the search and seizure occurred prior to appellant's arrest, it was an unlawful search and seizure which bars consideration at trial of those articles seized during the search.

ARGUMENT

The factual situation surrounding the arrest of this appellant varies between the arresting officer and the complainant.

The arresting officer testified that he observed a car turn into an alley while observing two persons in the car (TR 78). After circling the block, the police car turned in the same alley and stopped behind that car (TR 71). Appellant was standing beside the car when complainant jumped out of the car exclaiming, "Get him, get him. He done robbed me." (TR 71) Thereupon, after receiving a further report of the robbery (how much of a report or in what detail is not clear), he arrested appellant upon a strong suspicion of robbery and removed a watch from appellant's arm, which was identified by the complainant (TR 72, 74, 88). This version varies significantly in some respects from that of the complainant as will be discussed later herein. It is clear that the trial judge accepted this version and based his findings on this testimony. (Memorandum Opinion, J. Gasch, dated January 2, 1968). Here, it should be noted, the second man in the car with this appellant had disappeared at the time the officer pulled up behand the car and was nowhere in sight. Obviously, a short period of time, in seconds, had elapsed from the first police observation of two men in the car to the arrival of the police on the scene. It is difficult to believe that under these circumstances, the arresting officer could reasonably believe that probable cause existed

to arrest this appellant when all that the officer knew was "Get him. He robbed me.", and that the second man had obviously disappeared with a degree of alacrity that would lead an ordinarily prudent officer to believe the second man was the robber. Nowhere in the transcript is there a reference by the arresting officer to other circumstances that might give rise to probable cause for arrest of this appellant other than the self-serving statement that there was more said concerning the robbery by the complainant to the arresting officer. And of particular significance here is that the arresting officer could not recite what else, if anything, the complainant told him prior to the actual arrest. This, then, is the factual situation which, in light of recent case definitions, can hardly conform to "probable cause."

Probable cause is an elastic concept whose existence depends upon all facts and circumstances in the case, but the substance of which is a reasonable ground for belief of guilt. Bailey vs. U. S., U.S. App. D.C. , 389 F2 305, 308 (1967). When an arrest without a warrant is made for an offense not committed in the presence of the person arresting, the latter's good faith is not enough. Probable cause is a constitutional requirement that must be strictly enforced. Henry vs. U. S., 361 U.S. 98, 4 L.ed. 2d 134, 80 S.Ct. 168.

The instant situation is quite distinguishable from the cases involving "hot pursuit" analogous to Trimble vs. U. S., 125 U.S. App. D.C. 173, 369 F2 950 (1966). There, probable cause

existed where the arrest occurred during the complaining witness's pursuit of two men when he yelled to the arresting officer that the two had robbed him. "Flight of the suspect is an important circumstance in the knowledge of the officer, tending to justify arrest without a warrant." 5 Am Jur 2d, p. 737, Arrest, Sec. 45. And see U. S. vs. DiRe, 332 U. S. 581, 92 L.ed. 210, 68 S.Ct. 222. Here, there was no flight by appellant Allen, although there was flight by the second man who had been in the car with Allen.

The arresting officer testified that when he made the arrest, he had a strong suspicion that this appellant had robbed the complaining witness (TR 88). But, mere suspicion is not enough to constitute probable cause for arrest without a warrant. Mallory vs. U. S., 354 U.S. 449, 1 L.ed. 2d 1479, 77 S.Ct. 1356; Brinegar vs. U. S., 338 U.S. 160, 93 L.ed. 1879, 69 S.Ct. 1302; Beck vs. Ohio, 379 U.S. 89, 13 L.ed. 2d 142, 85 S.Ct. 223.

Plainly, then, the factual situation here did not establish probable cause for the arrest of this appellant. The fact that the search after arrest corroborated the arresting officer's suspicions does not then make the search legal or lend it credence not otherwise available. In Bailey vs. U. S., U.S. App. D.C. , 389 F2 305 (1967), at page 308:

> "It is well established that a search incident to a lawful arrest is permissible even without a warrant. This right unquestionably extends to a contemporaneous search of the car in the control of the accused at the time of arrest. The arrest which justifies the search, however, is lawful only if the Fourth Amendment standard of probable cause

is met. And there must be probable cause before the search begins, for a search is not to be made legal by what it turns up. In law, it is good or bad when it starts and does not change character from its success. U. S. vs. DiRe, 332 U.S. 581, 595..." (emp. supp.)

The testimony of the complainant varied from that of the arresting officer concerning the circumstances surrounding the arrest. (TR 45, 46, 47)

"Q. What was the first thing that was said by anyone to the police?

A. I was the first one that said anything. I told them they done robbed me and beat me up, too.

Q. Then what action if any did the police take?

A. When he asked me what did he take from me, I said my watch.

Q. Then what happened?

A. He reached in his arm and pulled ---

Q. You are referring to whom when you say "he"?

A. I said Allen had taken my watch.

Q. You just said that someone reached on his arm. Who reached?

A. The policeman.

A. He didn't put--When he asked me what did he take, I couldn't say my money because I still had my money in my pocket. I said my watch. So he raised it and looked at it. He reached over there and took his hand, covered it up with his hand and asked

me what kind of watch was it.

Q. Did you tell him what kind of a watch?

A. I told him it was a yellow gold watch with three or four links broken out of it, lost out of it. So he looked at it. He said, 'Well, I guess I got him for robbery.'"

From this testimony, it is apparent that, contrary to the arresting officer's testimony, the arrest was not made until after the seizure of the watch had been effected. This being an unlawful seizure, the fruit of the seizure remains contaminated. To hold otherwise would vitiate the requirement of probable cause and would result in a search and seizure, without probable cause, to enable the arresting officer to justify his arrest for probable cause. As was stated in the Bailey case (supra), "A search is not to be made legal by what it turns up." U. S. vs. DiRe, 332 U.S. 581, 92 L.ed. 210, 68 S.Ct. 222.

CONCLUSION

It is plainly apparent that, assuming the arrest of this appellant was made prior to the search and seizure, probable cause did not exist for the arrest under the fact situation developed at trial. It is further apparent that if the search and seizure occurred prior to the arrest, it was an unlawful search and seizure, the fruits of which should not have been considered by the trial judge.

WHEREFORE, appellant, by his court-appointed attorney, prays that this case be reversed and remanded to the trial court for proceedings consistent with this court's mandate.

Respectfully submitted,

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Court-Appointed Attorney for
Appellant Vance V. Allen

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QUESTIONS PRESENTED*

In the opinion of appellee, the following questions are presented:

1. Appellant's present challenge in no way affecting the length of his sentence, need it be considered?

2. If so, was there probable cause to arrest appellant for robbery and seize the gold watch he was wearing, where

(a) The victim leapt from his car and ran to the arresting officer's squad car, exclaiming as to the appellant, "Get him, Get him, he done robbed me and beat me up", and

(b) the hour was late and the appellant and his victim were present in an alley, and

(c) the arresting officer received from the victim a full report of the purported felony including a description of the watch stolen from him, which description conformed to the watch worn by appellant.

3. Was the watch seized from appellant's wrist prior to his arrest? If so, where probable cause for the arrested existed at the time of the seizure, does the juxtaposition of seizure and arrest vitiate the seizure?

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* This case is unrelated to *Vance Allen* v. *United States*, D.C. Cir. No. 20,955, decided January 25, 1968, where appellant's conviction in Cr. 181-66 for unauthorized use of a vehicle and simple assault was remanded for an evidentiary hearing to consider whether prejudice accrued to appellant from the denial to his counsel of access to certain grand jury testimony.

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TABLE OF CASES

* Cases chiefly relied upon are marked by an asterisk.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,770

VANCE V. ALLEN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By a two count indictment filed June 5, 1967, appellant was charged with unlawful use of a vehicle and with robbery in violation of 22 D.C. Code §§ 2204 and 2901. After a trial before United States District Court Judge Oliver Gasch sitting without a jury on December 26 and 27, 1967, appellant was found guilty on both counts. Appellant received sentences of twenty months to five years on each count, sentences to run concurrently.

At trial, the following was adduced. The victim, Harry E. Jeter, testified that at approximately 10:00 p.m. on

the night of March 29, 1967, he was getting into his car parked on the 400 block of R Street, N.W. He had just come from a nearby cab company where he was visiting with friends. (Tr. 14, 59, 62, 63.) As he was entering his car, a blue 1967 Dodge Dart, he felt a push on his back and was shoved onto the front seat. Appellant jumped in the passenger side and a second man got behind the wheel. (Tr. 16, 17, 64, 65.) The man behind the wheel demanded and got from Mr. Jeter, who was sitting in the middle of the front seat, the keys to the car and notwithstanding Jeter's pleas drove off. After a short while, the driver stopped. Appellant ordered Mr. Jeter to get into the back seat and lie down on it. (Tr. 21, 22.) With Mr. Jeter lying on the back seat, appellant and his companion continued to drive the car around the city, often driving through alleyways and several times stopping the car for brief conversations with others. Mr. Jeter was allowed to leave the car and relieve himself. Upon his return to the back seat, appellant ordered him to remove his jacket and handed it to the driver who went through the pockets. Appellant then went through Mr. Jeter's pants pockets and took his billfold. After finding it empty, appellant tossed it to Mr. Jeter and put his arm around Mr. Jeter's head. Appellant then hit Mr. Jeter in the stomach and chest with his fist and then as he returned to the front seat whirled and hit Mr. Jeter in the jaw, dazing him. (Tr. 30, 34, 35, 36.) During this encounter, appellant also pulled Mr. Jeter's gold watch from his wrist and put it on his own (Tr. 36, 37). Mr. Jeter was then ordered to lie down again on the back seat.

Sometime thereafter appellant switched with the other man and himself began driving the car (Tr. 38). The two alternately drove the car for the next several hours with Mr. Jeter lying on the back seat. Finally, sometime around 1:00 a.m., they pulled into an alley in the area near 4th Street and Florida Avenue, N.W. Appellant's companion, at this time driving, quickly alighted from the

car. Appellant himself got out. Mr. Jeter then raised himself from the back seat, thinking something was wrong. Looking through the back window of the car he saw a scout car behind them in the alley. (Tr. 42, 43, 44.) He quickly jumped out of the car directly behind appellant and yelled, "Get him, Get him. He done robbed me and beat me up, too." (Tr. 44). Mr. Jeter told the police that appellant had stolen his watch. The officer asked Mr. Jeter to describe it[1] and Mr. Jeter told him that it was yellow gold with several links broken in its band. The watch on appellant's arm corresponding to that description, appellant was placed under arrest for robbery and the watch removed from his arm. (Tr. 44, 45, 46, 47.) Mr. Jeter recovered his wallet from the floor of the car (Tr. 47). He gave no one permission to drive his car that evening (Tr. 48).

The arresting officer, Private Martin H. Niverth, then testified. He and his partner, Private H. C. Emerson, were patrolling the area in the 400 block of Florida Avenue in a marked squad car at 1:00 a.m. on the night in question. Seeing a blue Dodge Dart turn into a nearby alley, the officers circled the block and then drove up the alley behind the car. Officer Niverth then saw appellant get out of the car,[2] quickly followed by Mr. Jeter who leapt from the car and ran to his scout car saying that appellant had robbed him. (Tr. 70, 71, 72.) After receiving a full report from Mr. Jeter, including a description of the watch, Officer Niverth placed appellant under arrest and took from his arm the gold Bulova wrist watch (Tr. 74).[3] After being advised by Mr. Jeter that another

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[1] Although Mr. Jeter's testimony is somewhat unclear, it appears that the officer by his testimony covered the watch on appellant's arm with his hand so that Mr. Jeter could not see it while describing the watch stolen from him (Tr. 46).

[2] Officer Niverth arrived at the scene after appellant's companion had alighted from the car (Tr. 75).

[3] Officer Niverth apparently would not have permitted appellant to leave and would have restrained him directly after Mr. Jeter indicated that he had been robbed by appellant (Tr. 81, 88).

was involved. the Officer searched unsuccessfully for appellant's companion (Tr. 76). The Government then rested.

Appellant's motion to suppress the gold watch as unlawfully seized was denied and the watch in question, Government's exhibit number 1, was admitted into evidence (Tr. 89).[4] Appellant's motion for judgment of acquittal was also denied (Tr. 85). Appellant did not take the stand or put on any evidence.

The trial court found appellant guilty of unauthorized use of a vehicle and robbery of the watch (Tr. 116).[5]

STATUTES INVOLVED

Title 22 District of Columbia Code, § 2204, provides:

> Any person who, without the consent of the owner shall take, use, operate, or remove, or cause to be taken, used, operated, or removed from a garage, stable, or other building, or from any place or locality on a public or private highway, park, parkway, street, lot, field, inclosure, or space, an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven for his own profit, use, or purpose shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding five years, or both such fine and imprisonment.

Title 22 District of Columbia Code, § 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

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[4] See memorandum opinion filed January 5, 1968.

[5] The trial court found that the Government had not made a sufficient case with regard to the charges of robbery of the car and wallet.

SUMMARY OF ARGUMENT

Appellant's present contention in no way affects the length of his sentence and hence does not require consideration. In any event, it is without merit. Probable cause to arrest him for robbery of the victim, Harry Jeter, existed from the moment Mr. Jeter leapt from his car and ran to the squad car of Officer Martin Niverth, exclaiming as to appellant, "Get him, Get him. He done robbed me and beat me up, too." Officer Niverth's further investigatory response in the form of eliciting from Mr. Jeter a full report of the incident and the goods stolen from him was prudent and proper. It is only upon receipt of this report, which corroborated Mr. Jeter's earlier accusations, that Officer Niverth removed his watch from appellant's wrist. "Reacting to a street scene and trying to run down the facts . . .", Officer Niverth's conduct throughout the course of these circumstances was eminently reasonable. His arrest of appellant and seizure of the watch was based on ample probable cause.

Appellant's contention that the watch was seized prior to his arrest is unsupported by the record and in any event of no consequence. "[T]he basis of the search is made out by existence of probable cause for arrest whether or not an arrest is made prior to the search." *Bailey et al.* v. *United States*, D.C. Cir. Nos. 20,623-25, 20,729, decided December 14, 1967 (concurring opinion of Levanthal, J.) Appellant's deprecation of Officer Niverth's testimony and his intimation that it is inherently incredible is also unsupported.

ARGUMENT

Appellant's present challenge does not require consideration. In any event, probable cause existed to arrest appellant for robbery and the watch seized pursuant to that arrest was properly admitted below.

(Tr. 44, 45, 46, 47, 70, 71, 72, 73, 74, 76, 77, 78, 88)

Appellant's sole contention on appeal runs to the admission of evidence upon which his guilt on robbery (count two of the indictment) was established and for which he received a sentence of twenty months to five years. He does not challenge the verdict on count one, unauthorized use of a vehicle, for which he received a similar sentence of twenty months to five years, concurrent with that under count two. Accordingly, even if he were to prevail in his present attack, his sentence would remain unaltered. In such circumstances, appellant's contention in no way affecting his sentence to be served, it does not require consideration. *Hirabayashi* v. *United States*, 320 U.S. 81, 85 (1943); *Fabianich* v. *United States*, 112 U.S. App. D.C. 319, 302 F.2d 904, *cert. denied*, 371 U.S. 816 (1962); *Gibson* v. *United States*, 106 U.S. App. D.C. 10, 13, 268 F.2d 586, 589 (1959); *Robinson* v. *United States*, 93 U.S. App. D.C. 347, 349, 210 F.2d 29, 32 (1954). *Cf. Barenblatt* v. *United States*, 360 U.S. 109, 115 (1959); *Kosmos* v. *United States*, 111 U.S. App. D.C. 234, 296 F.2d 356 (1961).

In any event, we think appellant's substantive contention is without merit. Appellant at various points claims that no probable cause existed for his arrest for robbery (App. Br. 5), and that even if probable cause existed, the seizure of the wrist watch occurred before his arrest (App. Br. 7), and that the trial court as trier of fact erroneously believed the testimony of the arresting officer which was inherently incredible (App. Br. 3, 4). We treat these contentions seriatim.

The victim, Harry Jeter was held captive in his car, a blue Dodge Dart, for some three hours, driven around

the city and at various times pummelled by appellant who took his watch and wallet from him. Appellant placed Mr. Jeter's watch on his wrist. Officer Martin Niverth and his partner were patrolling the area near 4th Street and Florida Avenue, N.W. at 1:00 a.m. when they saw the blue Dodge Dart pull into an alley. The officers followed in their squad car. Officer Niverth saw appellant get out of the car. He then saw Mr. Jeter "leap" out of the car and run over to the officers' squad car. The officers' vehicle was still moving. (Tr. 70, 71, 72). Jeter shouted, "Get him, Get him. He done robbed me and beat me up, too" (Tr. 44, 72). We think Judge Gasch was eminently correct in determining that at this point probable cause existed to arrest appellant. Probable cause for arrest exists if the "officer in the particular circumstances, conditioned by his observations and information, and guided by the whole of his police experience, reasonably could have believed that a crime had been committed by the person to be arrested." *Jackson* v. *United States*, 112 U.S. App. D.C. 260, 262, 302 F.2d 194, 196 (1962). Officer Niverth was confronted by the excited victim of a purported felony, leaping from a car and running to the officer's moving squad car, all the while exclaiming that he had been robbed and beaten and indicating the appellant to be his assailant. The hour was late and the circumstances were otherwise suspicious. We think the law in this jurisdiction is clear that this factual situation gave Officer Niverth probable cause to believe that a felony had been committed and that it was appellant who committed it. *Trimble* v. *United States*, 125 U.S. App. D.C. 173, 369 F.2d 950 (1966). *Cf. Brown* v. *United States*, 125 U.S. App. D.C. 43, 46, 365 F.2d 976, 979 (1966); *Payne* v. *United States*, 111 U.S. App. D.C. 94, 294 F.2d 723, *cert. denied*, 368 U.S. 883 (1961); *Kennedy* v. *United States*, 122 U.S. App. D.C. 291, 353 F.2d 462 (1965).[4]

[4] These cases stand in part for the settled proposition that for the purposes of establishing probable cause the police are entitled to

However, not content to rely on these accusations and before arresting appellant and seizing the watch, Officer Niverth attempted to further investigate the circumstances of the situation.[7] He responded to Mr. Jeter's exclamations by obtaining from him information as to the character of the goods of which appellant had robbed him. Mr. Jeter described with some detail the watch taken by appellant and which appellant wore on his arm. Officer Niverth got a "full report" from the complainant

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rely on information coming from what purports to be an *anonymous* victim or observer of a crime because of the high reliability of personal observation. *A fortiori*, they comprehend the establishment of probable cause to arrest by the report of a *known* victim.

[7] Relying on Officer Niverth's testimony that he would have restrained appellant if he tried to leave during the Officer's questioning of Jeter, Judge Gasch found the arrest to have occurred at this juncture, directly after the officer was told by Jeter that appellant had robbed him. Memorandum Opinion at 3.

We think Officer Niverth's actions throughout these circumstances were entirely reasonable and proper. We do not think they turn on the "nicer technicalities of the laws of arrest." *Liles and Johnson* v. *United States*, D.C. Cir. No. 20,807, 20,808, decided November 16, 1967. Insofar as they do, we think the actual arrest occurred after the officer had finished questioning Jeter when he told appellant that he was under arrest for robbery (Tr. 73, 74). A myriad of cases make clear that brief on-the-street restraints reasonably necessary in the course of "screening crimes from relatively routine mishaps" are proper and do not constitute a formal arrest. *Vance Allen* v. *United States*, D.C. Cir. No. 20,955, decided January 25, 1968, slip op. at 6. See also, *Bailey* v. *United States*, D.C. Cir. No. 20,623-625, 729, decided December 14, 1967 (concurring opinion of Levanthal, J.); *Dorsey* v. *United States*, 125 U.S. App. D.C. 355, 372 F.2d 928 (1967); *Brown* v. *United States*, 125 U.S. App. D.C. 43, 46, n.4, 365 F.2d 976, 979 n.4 (1966); *Green* v. *United States*, 104 U.S. App. D.C. 23, 259 F.2d 180 (1958), *cert. denied*, 359 U.S. 917 (1959); *Dixon* v. *United States*, 111 U.S. App. D.C. 305, 296 F.2d 427 (1961); *Cotton* v. *United States*, 371 F.2d 385, 391-92 (9th Cir. 1967); *Wilson* v. *Porter*, 361 F.2d 412, 415 (9th Cir. 1966); *Busby* v. *United States*, 296 F.2d 328, 331 (9th Cir. 1961), *cert. denied*, 369 U.S. 876 (1962); *United States* v. *Lewis*, 362 F.2d 759 (2d Cir. 1966); *United States* v. *Bonnano*, 180 F. Supp. 71, 78 (S.D.N.Y.), *rev'd on other grounds sub. nom.*, *United States* v. *Bufalino*, 285 F.2d 408 (2d Cir. 1960). And see *Terry* v. *Ohio*, No. 67—October Term, decided June 10, 1968, concurring opinion of Harlan, J., 2, 3.

and found the watch worn by appellant to correspond to Mr. Jeter's description. (Tr. 72, 73, 74.) During the short period of the investigatory colloquy between Mr. Jeter and Officer Niverth, appellant remained nearby. No questions were directed at him; however, Officer Niverth apparently would have restrained him if he chose to leave. (Tr. 88). We think the officer's investigatory response was entirely reasonable. "[R]eacting to a street scene and trying to run down the facts. . .",[8] Officer Niverth received information from Mr. Jeter substantially corroborating his earlier accusations. Upon receipt of the "full report" of the incident, Officer Niverth then—and we submit most reasonably—arrested appellant for robbery and took from his arm the gold watch.[9]

Appellant's complaint that the watch was seized from his wrist before his arrest is without merit. It has no foundation in the transcript portions he relies on, which reveal no more than that the officer made certain Mr. Jeter was unable to see the watch worn by appellant when he described his own watch. (Tr. 45, 46, 47). Both Officer Niverth and Mr. Jeter were clear that the gold watch was not removed from appellant's wrist until after his arrest (Tr. 46, 72, 74). Moreover, as we have argued probable cause to arrest appellant existed from the moment Mr. Jeter first exclaimed that appellant had robbed and beaten him, prior to any search of appellant's person or seizure of any of his belongings. Thus, whether the

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[8] *Vance Allen* v. *United States*, D.C. Cir. No. 20,955, decided January 25, 1968, slip op. at 6.

[9] In support of his contention that probable cause was lacking for his arrest, appellant relies solely on Officer Niverth's answer to counsel's leading question that he had a "strong suspicion" that a crime had been committed after hearing Mr. Jeter's initial exclanations that appellant had robbed him (Tr. 88). By obvious acrobatics, appellant immediately concludes that therefore his arrest was based on but "mere suspicion" (App. Br. 5). We think it clear that Officer Niverth's characterization of his beliefs at this juncture was in laymen's terms and is not dispositive of the legal questions here at issue. Judge Gasch found—and we think quite properly—that Officer Niverth *reasonably believed* appellant to have committed the robbery of Mr. Jeter after hearing his outcries.

seizure of the watch occurred prior to appellant's formal arrest some moments later or not, it was supported by ample probable cause. As Judge Levanthal has stated, ". . . the basis of the search is made out by the existence of probable cause for arrest whether or not an arrest is made prior to the search." *Bailey et al.* v. *United States*, *supra*, slip op. at 20. See also *People* v. *Simon*, 45 Cal.2d 645, 290 P.2d 531 (1955).

Appellant's intimation that Officer Niverth's testimony was so plainly suspect as to make it "clearly erroneous" [10] for Judge Gasch to believe it is without merit. Officer Niverth testified that he arrived at the scene after appellant's companion had alighted from the car. He did not see him leave and was not informed of his existence until some moments later when Mr. Jeter gave a full description of the events to him. (Tr. 76, 77, 78). At this time, he questioned nearby individuals but was unable to locate appellant's accomplice (Tr. 76, 77, 78). We think his testimony relating these efforts and the efforts themselves were entirely reasonable. Appellant reproaches Officer Niverth for "self-serving" statements by the officer that "more was said concerning the robbery by the complainant" but that he was unable to remember it (App. Br. 4). We are unable to find any statement by Officer Niverth in which he indicates inability to remember the substance of the complainant's report and in any event we think it of no consequence. Appellant's final thrust is that "the testimony of the complainant varied from that of the arresting officer" concerning the circumstances of the arrest (App. Br. 6). However, the testimony of both was substantially consistent on all aspects of the brief series of events. It is appellant who misconstrues the portion of the complainant's testimony cited in his brief (at 6) which is supposedly "at variance" with the officer's.[11]

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[10] Compare *Jackson* v. *United States*, 122 U.S. App. D.C. 324, 326, 353 F.2d 862, 864 (1965).

[11] Appellant claims Mr. Jeter testified that the watch was seized from appellant prior to his arrest. However, the quoted portion

In sum, we think Officer Niverth, "reacting to a street scene and trying to run down the facts", was decidedly prudent and reasonable in the manner in which he investigated the circumstances surrounding the robbery of the complainant and ultimately effected appellant's arrest and seized the watch from his wrist. Judge Gasch was correct in so holding and in denying appellant's motion to suppress introduction of the watch.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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United States Attorney.

FRANK Q. NEBEKER,
SCOTT R. SCHOENFELD,
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Assistant United States Attorneys.

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merely indicates that Officer Niverth made certain Mr. Jeter could not see the watch on appellant's wrist when he described his purportedly stolen watch. Appellant, by some obvious sophistry, calls this a "seizure".

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